

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0833

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 18, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 132842). The employer filed a timely request for hearing. On April 22, 2014, ALJ Turner conducted a hearing, and on April 24, 2014 issued Hearing Decision 14-UI-15996, concluding claimant voluntarily quit work without good cause. On May 14, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The Monitor Inn employed claimant as a bartender/cook from November 1, 2012 until February 24, 2014. Mr. Doody, the owner, and his wife, Ms. Doody, supervised claimant.

(2) In January 2014, claimant submitted a doctor's note to the owner and her supervisor stating she was scheduled for a surgical procedure requiring her to be off work on February 21 and 22, 2014. Claimant refused to provide information regarding the specifics of her surgery to the owner or to her supervisor, but they overheard customers discussing the nature of claimant's surgical procedure and underlying medical issues.

(3) After work on February 10, 2014, claimant met with Ms. Doody in the employer's kitchen. Ms. Doody again requested information about any work restrictions that claimant's upcoming surgery would require. Claimant refused to provide additional information. An argument ensued, loud enough to be overheard by customers, including claimant's boyfriend and family members, who complained to the owner that claimant's privacy rights were violated.

(4) On February 14, 2014, Ms. Doody met with claimant to apologize for the February 10 argument. The owner, Ms. Doody and claimant acknowledged they had discussed claimant's medical and personal issues with customers. Claimant asked that Ms. Doody cease communicating with her through texts and cease discussing claimant's personal issues on Facebook. Claimant believed the conversation had resolved their conflict. Ms. Doody continued to send texts to claimant, but claimant did not complain about that to the owner.

(4) Claimant returned to work from February 15 through February 17, 2014. Claimant was not scheduled to work from February 18 through February 23, 2014. On February 19, 2014, claimant submitted a letter of resignation informing the employer she intended to quit effective March 4, 2014. Claimant gave no reason for her decision to leave work.

(5) The owner learned that claimant had a job interview with a competing employer on February 18, 2014. The owner believed, based on rumors from customers and claimant's coworker, that claimant was recruiting customers to the competing employer. The owner also believed claimant intended to call in sick on February 24.

(6) On February 24, 2014 claimant had difficulties with post-surgical swelling and arrived twenty minutes late for her scheduled shift. The employer discharged claimant at that time.

CONCLUSIONS AND REASONS: The employer discharged claimant, not for misconduct, within 15 days of claimant's planned quit without good cause.

The first issue in this case is whether claimant quit work or was discharged. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time, but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

The record shows claimant submitted her resignation on February 19, 2014 and informed the employer that her last day of work would be March 4, 2014. Both parties agree that the employer did not allow the claimant to continue working until March 4, 2014, by discharging her on February 24, 2014. Because claimant was willing to continue working for the employer until March 4, 2014, but was not allowed to do so by the employer, the February 24, 2014 work separation was a discharge.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. Absences or tardiness due to an illness or injury is not misconduct. *See accord* OAR 471-030-0038(3)(b).

The employer discharged claimant because the owner believed claimant had recruited its customers on behalf of a potential new employer and because she intended to call in sick on February 24, 2014. Claimant denied having a new employer or recruiting customers for the new employer. The testimony was equally balanced on this issue and willful or wantonly negligent misconduct has not been shown.

To the extent the owner discharged claimant for being 20 minutes late to work on February 24, 2014, claimant's post-surgical issues were not willful or wantonly negligent misconduct.

However, ORS 657.176(8) provides that when an individual has notified an employer that she will quit work on a specific date, and the employer discharged her, not for misconduct, no more than fifteen days prior to that date, and the quit would have been without good cause, the work separation is adjudicated as if the discharge had not occurred and the planned quit had occurred, and the individual is disqualified from receiving benefits, except that she is eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date. Claimant notified the employer she would end her employment on March 4, 2014. The employer discharged her, not for misconduct, on February 24, 2014, less than 15 days prior to her planned quit date. Therefore, we must determine whether claimant's planned quit would have been without good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for leaving work when she did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work. OAR 471-030-0038(4). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for her employer for an additional period of time. The claimant has the burden to establish good cause by a preponderance of evidence. *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000).

Claimant did not provide a reason why she planned to quit. Based on this record claimant quit because of ongoing concerns about the employer and her supervisor discussing her medical and personal issues with customers. However, claimant acknowledged participating in the same behavior. After their argument on February 10, 2014, claimant attended a meeting in which Ms. Doody apologized for the argument. Although Ms. Doody continued to send claimant text messages, claimant did not complain to the owner. Claimant failed to establish that she had no reasonable alternative but to quit work because of this continued communication and therefore, that she had good cause to quit work for that reason.

In sum, claimant notified the employer of her intention to voluntarily quit work without good cause, but was discharged within fifteen days of the planned quit for a reason that did not constitute misconduct. Pursuant to ORS 657.176(8), claimant is disqualified from receiving unemployment insurance benefits effective the week of her planned voluntary quit, the week from March 2, 2014 to March 8, 2014 (week 10-14).

DECISION: Hearing Decision 14-UI-15996 is affirmed.

Tony Corcoran and J. S. Cromwell;
Susan Rossiter, not participating.

DATE of Service: June 25, 2014

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the website at court.oregon.gov. Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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